imprisonment term imposed in an early trial of the same accused on another offence as the court may direct. It has no application to sentences of whipping. Similarly, section 282(d) of the Criminal Procedure Code deals with sentences of imprisonment and not sentence of whipping.

To order concurrent sentences of whipping as understood in the light of the authorities cited above is to impose a heavier punishment through a mode of execution not legally provided. In any event, it is, in my view, unauthorised by law.

For the above reasons the order of concurrent execution of the 5 strokes of the rattan together with those ordered in Case No. 16/82 is set aside.

The learned trial President considered it fit that the sentence of whipping should be imposed. I do not propose to interfere with that. However, it is difficult to assess how many strokes would have been imposed had the concurrent order not been erroneously made. It seems, from the judgment of the learned trial President, that he did not intend that 5 strokes of the rattan were to be separately and physically inflicted in this Case No. 17/82 in addition to the 5 strokes ordered in Case No. 16/82. Indeed, it might be argued that in all no more than 5 strokes were, in effect, intended to be physically inflicted for both cases. In the particular circumtances of this case, I consider it fair and reasonable that the sentence of whipping be reduced by 3 strokes *i.e.* from 5 strokes to 2 strokes. And I so order. The sentence of 5 years' imprisonment running from August 2, 1982 is, of course, to remain.

Order accordingly.

RE WALTER SU

EX PARTE UNITED MALAYAN BANKING CORPN. BHD.

[O.C.J. (Mohamed Dzaiddin J.) April 30, November 24 & December 28, 1984]

[Penang – In Bankruptcy No. 347 of 1983]

Debtor and Creditor – Petition for Receiving Order – Notice of Intention to Oppose – Whether Bankruptcy Notice was properly issued and reliance of act of bankruptcy by creditor valid – Bankruptcy Act 1967, s. 6(4).

Bankruptcy – Whether Bankruptcy Notice was properly issued and reliance of act of bankruptcy by creditor valid.

This was a Notice of Intention filed by the debtor on September 25, 1984 to oppose the creditor's petition for a Receiving Order. The debtor challenged, *inter alia*, the validity of the Bankruptcy Notice issued on October 20, 1983 and the act of bankruptcy relied on by the creditor in the petition, and had asked that this petition be dismissed or stayed on the ground that an appeal was pending against the summary judgment of the learned Registrar. The Bankruptcy Notice issued was in respect of this judgment sum and the act of bankruptcy relied upon by the judgment creditor was his failure to comply with the requirement of the Bankruptcy Notice.

Held, dismissing the application: (1) the Court had a discretion to allow an extension of time to serve the Bankruptcy Notice even though such application was made after the expiration of one month from the issue thereof;

(2) the mere fact that an appeal is pending over the judgment is not a sufficient ground for staying the proceedings upon the petition. The Court of Bankruptcy will not, as a matter of course, enquire into the validity of a judgment debt, but only when there is evidence that a judgment had been obtained by fraud or collusion, or that there has been some miscarriage of justice;

(3) in the present case, no sufficient reason has been shown by the debtor to enable the Court to exercise its discretion in favour of a stay. A Receiving and Adjudication Order would be made against the debtor.

[*Editorial Note:* The judgment debtor appealed against the decision of Mohamed Dzaiddin J. The Supreme Court (Abdul Hamid C.J. (Malaya), Mohamed Azmi and Syed Agil Barakbah S.C.JJ.) in Supreme Court Civil Appeal No. 34 of 1985 on November 20, 1985 upheld the judgment of the learned Judge.]

Cases referred to:

(1) *Re Robert Chuah Koh Hoay ex parte Hwang & Yusoff Securities Sdn. Bhd. (Unreported)* (Bankruptcy No. 205 of 1983, Judgment of Mohamed Dzaiddin J.).
(2) *Re French Ex parte French* (1889) 6 Mor. 258; 24 Q.B.D. 63, C.A.
(3) *In re Noble (A Bankrupt)* [1965] 1 Ch. 129.
(4) *In re Flatau. Ex parte Scotch Whisky Distillers* (1889) 22 Q.B.D. 83.
(5) *In re Saville* (1887) 4 Mor. 277, 279; 3 T.L.R. 791.

IN BANKRUPTCY.

Subash Chandran for the judgment debtor.

Leow Soon Ch'ng (Miss) for the judgment creditor.

Madan Mohan Lall (Asst. Official Assignee) also appearing.

Cur. Adv. Vult.

Mohamed Dzaiddin J.: This creditor's petition for a Receiving Order came up before me on November 23, 1984. A Notice of Intention to Oppose the petition was filed on September 25, 1984. On November 24, 1984 I heard submissions of counsel. Although six grounds were given for opposing the petition, Mr. Subash Chandran, counsel for the debtor merely challenged the validity of this Bankruptcy Notice issued on October 20, 1983 and the act of bankruptcy relied on by the judgment creditors in the petition. In the final analysis, he has asked that this petition be dismissed or stayed on the ground that an appeal is pending against the summary judgment of the learned Registrar in Civil Suit No. 276 of 1981. The Bankruptcy Notice issued was in respect of this judgment sum and the act of bankruptcy relied upon by the judgment creditor was his failure to comply with the requirement of the Bankruptcy Notice.

On the question of the validity of the Bankruptcy Notice issued on October 20, 1983, I have held that the said Bankruptcy Notice was properly issued. In this respect, I referred counsel to my judgment in *Re: Robert Chuah Koh Hoay ex parte: Hwang & Yusoff Securities Sdn. Bhd.*[1] where a similar point was argued. I held the view that the Court had a discretion to allow an extension of time to serve the Bankruptcy Notice even though such application was made after the expiration of one month from the issue thereof.

On the second issue, Mr. Subash Chandran has urged me to exercise my discretion to grant a stay of this Bankruptcy Petition until an appeal against the order of the learned Registrar is completed. Section 6(4) of the Bankruptcy Act 1967 provides that where the act of bankruptcy relied on is non-compliance with the Bankruptcy Notice to pay, secure or compound for a judgment debt, the court may if it thinks fit stay or dismiss the petiton on the ground that an appeal is pending from the judgment. It is clear that this court has a discretion whether to stay the proceedings or not, but the debtor cannot claim a stay as a right. Where the court in the exercise of its discretion refuses to stay the proceedings, its decision will be upheld, unless it is clear that the discretion was wrongly exercised (*Re: French, ex parte French*[2]).

It has been held that the court in exercising its discretion whether to grant or refuse the stay of proceedings could have regard to all the circumstances of the case (In *re: Noble (A Bankrupt*[3]). In the present case the summary judgment against the debtor was granted by the Registrar on September 22, 1982. Immediately after the judgment the debtor filed an appeal to the Judge in Chambers which said appeal came up for hearing on December 6, 1982. As neither the debtor nor his counsel appeared before the Judge, it was then ordered that no appeal would be entertained until and unless costs thrown away was paid by the debtor to the judgment creditor's solicitors. On December 7, 1982, the judgment creditor's solicitors wrote to the debtor's solicitors informing them that the Judge had ordered the debtor to pay costs thrown away and had ruled that no appeal was to be heard if costs were not paid first. They had also asked for the cheque for the sum of $120 being costs thrown away. In addition, they requested the debtor's solicitors to return the draft order and judgment duly approved. On December 16, 1982, the judgment creditor's solicitors wrote to the Registrar, High Court, informing him that the draft judgment was sent to the debtor's solicitors on September 23, 1982 with the reminder sent on December 7, 1982. However, since then no reply had been received from the debtor's solicitors. In the circumstances, they enclosed a fresh order and judgment for the Registrar's approval. On January 15, 1983 the Registrar wrote to the debtor's solicitors informing them that the appeal would not be fixed for hearing until they complied with the order of court. The matter stood where it was until the solicitors for the judgment creditors started bankruptcy proceedings against the debtor. Then, on November 21, 1984, more than two years after the judgment was obtained and an appeal filed, the present counsel for the judgment debtor sent in a cheque for $120 being settlement of the costs.

These events are highlighted to show the *bona fide* of the appeal against the Order 14 judgment. In fact, on April 30, 1984 I heard an application by the debtor for stay of both execution and bankruptcy proceedings pending appeal. After submission of counsel, I dismissed the application on ground that the appeal was not made *bona fide*. There is also now before me an affidavit of the debtor affirmed on November 21, 1984 filed in support of the present application, where the debtor has alleged some form of collusion between the judgment creditor and one Mr. Tan Beng Hwa against the debtor, which he said was a good ground for appeal to succeed. However, it is common ground that Civil Suit No. 276 of 1981 in which judgment was entered against the debtor was a claim based on an overdraft facility granted by the judgment creditor to Aspac Enterprises

Sendirian Berhad and guaranteed by the debtor and his son. By a Letter of Guarantee executed on March 26, 1974, the debtor jointly with his son agreed to guarantee the company to the extent of $100,000. Upon demand by the judgment creditor's solicitors the debtor failed to pay the outstanding debt owed by the company. Hence, an Order 14 judgment was obtained by the judgment creditor against the debtor.

In *In re: Flatau ex parte Scotch Whisky Distillers,*[4] the Court of Appeal held that when in a bankruptcy petition the act of bankruptcy relied on is the failure to comply with the bankruptcy notice to pay a judgment debt, the mere fact that an appeal is pending over the judgment is not a sufficient ground for staying the proceedings upon the petition. The Court of Bankruptcy will not, as a matter of course, enquire into the validity of a judgment debt, but only when there is evidence that a judgment had been obtained by fraud or collusion, or that there has been some miscarriage of justice. In the words of Fry L.J., at p. 86:

"Sub-section 4 throws on the person who applies for a stay the burden of showing a reason for it; the sub-section does not say that there shall be a stay unless the Court shall be of opinion to the contrary, but that there shall be a stay 'if the Court thinks fit.' It lies on the applicant to show a reason for the stay, and no sufficient reason has been shown in the present case."

In *re: Saville*[5] the Master of the Rolls said:

"It seems to me that the case of *ex parte Lennox* 16 Q.B.D. 315 shows that a mere fact of a judgment having been recovered does not prevent the Court of Bankruptcy, if sufficient reasons are given for doing so, from going behind the judgment. But it does not decide that, there being a judgment, on the mere suggestion of the debtor that the judgment is bad, the Court of Bankruptcy is bound to go behind the judgment and inquire into the validity of the debt."

In the present case, following the above authorities I am satisfied that no sufficient reason has been shown by the debtor to enable me to exercise my discretion in favour of a stay. This application is, therefore, dismissed and a Receiving and Adjudication Order is made against the debtor.

Application dismissed.

Solicitors: *Subash Chandran, Lim Huck Aik & Co.*

SEOW MUI KIM v. PERWIRA HABIB BANK & ORS.

[O.C.J. (Gunn Chit Tuan J.) September 19, 1985]

[Kuala Lumpur – Civil Suit No. C 3485 of 1985]

Contract – Deposit of shares by way of securities to Bank – Default of payment by third parties as borrowers – Registration of shares in name of Bank's nominees – Whether lawful.

The plaintiff was granted an *ex parte* order on July 1, 1985, for various injunctions, including a mandatory injunction against the defendants involving 1,263,500 shares in Kamunting Tin Dredging (M) Bhd. owned by her and her representees. These shares were deposited by them with blank transfer forms duly executed with the first defendant by way of security in respect of loans granted to third parties who defaulted in payment. As a result, the first defendant proceeded to register the shares in favour of its nominee, Perwira Habib Nominees Sdn. Bhd. The first defendant and the fifth defendant now apply to set aside the *ex parte* order restraining the defendant from dealing with the shares adverse to their interest. The main issue for decision was whether the taking away of the plaintiff's shares was lawful.

Held: (1) the first defendant bank was in the circumstances of this case legally entitled to register the shares of the plaintiff and her representees into the name of its nominee company;

(2) even if there were triable issues in this case, the plaintiff was not on the balance of convenience in the light of the evidence available to court on July 5, 1985, entitled to the various injunctions, including the mandatory injunction ordering the first defendant to execute fresh proxy forms in respect of the said 1,263,500 shares which were originally in her name and those whom she represented;

(3) the order granted to the plaintiff on July 1, 1985, must therefore be set aside;

(4) applications for stay of execution and fresh injunction were refused.

Cases referred to:–

(1) *Re J. L. Young Manufacturing Co. Ltd.* [1900] 2 Ch. 753.
(2) *In re Tahiti Cotton Company* (1874) L.R. 17 Eq. 273.
(3) *Stubbs* v. *Slater* [1910] 1 Ch. 632.
(4) *Official Assignee, Bombay* v. *Madholal Sindhu* A.I.R. 1947 Bombay 217.
(5) *Boyce* v. *Gill* (1891) 64 L.T. 824.
(6) *Arjun Prasad* v. *Central Bank of India* A.I.R. 1956 Pat. 32, 37.
(7) *Deverges* v. *Sandeman, Clark & Co.* [1902] 1 Ch. 579.
(8) *Harrold* v. *Plenty* [1901] 2 Ch. 314, 316.
(9) *Erinford Properties Ltd.* v. *Cheshire County Council* [1974] 2 All E.R. 448.

APPLICATIONS.

Sri Ram for plaintiff/respondent.